

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DANIEL ESCOBAR-GARIBALDI,) Civil No. 3:13-cv-1730-AJB
Petitioner,) [Related Criminal No.
v.) 3:11-cr-00200-AJB-1]
UNITED STATES OF AMERICA,) **ORDER DENYING
PETITIONER'S MOTION TO
VACATE UNDER 28 U.S.C. § 2255**
Respondent.)

[Doc. No. 35]

Daniel Escobar-Garibaldi (“Petitioner”) moves this Court to reduce his time in federal custody pursuant to 28 U.S.C. § 2255, arguing that Petitioner was sentenced to a higher guideline range than what he believed was proper. For the following reasons, the Court **DENIES** the motion.

DISCUSSION

On December 28, 2011, pursuant to a written plea agreement, Petitioner pled guilty to Count 1 of the Information in Criminal Case No. 11cr00200-AJB charging a violation of 8 U.S.C. § 1326 (a) and (b). (*See* Conditional Plea Agreement, Doc. No. 11.) The Court sentenced Petitioner on May 19, 2011 to forty-six (46) months imprisonment and three (3) years of supervised release. (*See* Judgment Doc. No. 33.)

1 In Title 28 of the United States Code, Section 2255 provides that if a petitioner's
 2 motion, file, and records "conclusively show that the movant is entitled to no relief," the
 3 Court summarily may dismiss the motion without sending it to the United States
 4 Attorney for response. *See* 28 U.S.C. § 2255(b). The rules regarding Section 2255
 5 proceedings similarly state that the Court summarily may order dismissal of a Section
 6 2255 motion without service upon the United States Attorney only "[i]f it plainly appears
 7 from the face of the motion, any attached exhibits, and the record of prior proceedings
 8 that the moving party is not entitled to relief . . ." Rule 4(a), Rules governing Section
 9 2255 Proceedings for the United States District Courts, 281 U.S.C. foll. § 2255 (West
 10 2009). Thus, when a movant fails to state a claim upon which relief can be granted, or
 11 when the motion is incredible or patently frivolous, the district court may summarily
 12 dismiss the motion. *Cf. United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989);
 13 *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985).

14 A defendant may waive his right to file a Section 2255 motion to challenge his
 15 sentence, but such a waiver must state so expressly. *United States v. Nunez*, 223 F.3d
 16 956, 959 (9th Cir. 2000). However, a defendant may not waive an ineffective assistance
 17 of counsel claim challenging the knowing and voluntary nature of the plea agreement or
 18 the voluntariness of the waiver itself. *United States v. Rahman*, 642 F.3d 1257, 1259
 19 (9th Cir. 2011); *United States v. Jeronimo*, 398 F.3d 1149, 1156 n. 4 (9th Cir. 2005).
 20 Petitioner's plea agreement states in part:

21 In exchange for the Government's concessions in this plea agreement,
 22 defendant waives, to the full extent of the law, any right to appeal or to
 23 collaterally attack the guilty plea, conviction and sentence, including any
 24 restitution order, unless the Court imposes a custodial sentence above the
 25 greater of the high end of the guideline range recommended by the Govern-
 26 ment pursuant to this agreement at the time of sentencing or statutory
 27 mandatory minimum term, if applicable. If the custodial sentence is greater
 28 than the high end of that range, the defendant may appeal, but the Government
 will be free to support on appeal the sentence actually imposed. If defendant
 believes the Government's recommendation is not in accord with this
 agreement, defendant will object at the time of sentencing; otherwise the
 objection will be deemed waived. If the defendant breaches this plea agree-
 ment, at any time, in any way, including, but not limited to, appealing or
 collaterally attacking the conviction or sentence the Government may
 prosecute defendant for any counts, including those with mandatory minimum
 sentences, dismissed or not charged pursuant to this plea agreement. Addition-

1 ally, the Government may use any factual admissions made by defendant
 2 pursuant to this plea agreement in any such prosecution.

3 (3:11-cr-010200-AJB, Doc. No. 11 at 3.) The Ninth Circuit approves of such waivers
 4 on public policy grounds, reasoning that finality is “perhaps the most important benefit
 5 of plea bargaining” *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990).
 6 Courts will generally enforce a defendant's waiver of his right to appeal if: (1) “the
 7 language of the waiver encompasses the defendant's right to appeal on the grounds
 8 claimed on appeal,” and (2) “the waiver is knowingly and voluntarily made.” *United*
 9 *States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998). Here, defendant's sentence
 10 was below the high end of the guideline range recommended by the Government
 11 pursuant to the agreement at the time of sentencing. The government submitted a
 12 guideline range of 46 to 57 months, and the court sentenced defendant to the low end.
 13 The Court concludes that both of these requirements are met for a waiver to exist in this
 14 case. Accordingly, Petitioner's motion is barred and must be dismissed because of his
 15 plea agreement waiver.

16 Even if Petitioner had not waived his right to attack his conviction and sentence,
 17 Petitioner's motion would fail on the merits. Petitioner lacks any support for his
 18 arguments that the Court should make a departure because Petitioner initialed and signed
 19 the plea agreement which clearly stated the Adjusted Offense Level totaling nineteen
 20 (19)¹. Combined with a Criminal History Category of IV, the resulting guideline range is
 21 forty-six (46) to fifty-seven (57) months. Petitioner argues that he should have been
 22 sentenced to an Adjusted Offense Level of fifteen (15): base level for crime sentenced of
 23 twelve (12) points, plus prior conviction upper enhancement of six (6) points, less
 24 reduction for accepting responsibility of three (3) points. However, nothing in the record
 25 supports Petitioner's contention and calculation.

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 27
 28 ¹ Base offense level of eight (8), plus prior conviction upper enhancement of sixteen (16), less
 adjustment made for acceptance of responsibility of three (3) and fast track of two (2), totaling nineteen
 (19).

What the United States Attorney chooses to offer as part of any plea agreement is within the province of the United States Attorney. The Court is prohibited from participating in the plea bargaining process. Fed. R. Crim. P. 11(c)(1).

At sentencing, and by statute, the Court may depart downward only if there are "aggravating or mitigating circumstances . . . not adequately taken into consideration by the Sentencing Commission." In sentencing Petitioner, the Court considered all of the potential departures available in determining the advisory guidelines applicable in this case.

In addition, under 18 U.S.C. § 3553(b) and by law, the Court can depart outside the Advisory Guideline System for reasons set forth in the factors of and policy reasons behind the Federal Sentencing Statute, 18 U.S.C. § 3553(a). All relevant factors were taken into consideration at the time of Mr. Escobar-Garibaldi's sentencing.

CONCLUSION

Based on the foregoing reasons, the Court DENIES Petitioner's Motion to Vacate Under 28 U.S.C. § 2255. (Doc. No. 35)

IT IS SO ORDERED.

DATED: September 25, 2013

Hon. Anthony J. Battaglia
U.S. District Judge